No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1951

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN NATIONAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Fifth Circuit entered on February 5, 1951 (R. 189-193),* petition for rehearing denied April 2, 1951 (R. 197), in so far as it sets aside a portion of an order issued by the Board against the American National Insurance Company (R. 153-155).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 89-193)

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* References to the three separately paginated printed volumes which comprise the record before this Court are as follows: for the Transcript of Record in the court below, "R."; for the Appendix to the Board's brief in the court below, "B.A."; for the Appendix to the Company's brief in the court below, "P.A.".

is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 140-162) are reported at 89 NLRB, No. 19.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1951. Petition for rehearing was denied on April 4, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

The question presented is whether the employer violated Section 8 (a) (5) of the Act by refusing to enter into any contract with a union unless the union agreed to include therein a clause waiving its statutory right to bargain about certain terms or conditions of employment.

STATUTE INVOLVED

The statutory provisions principally involved are Sections 8 (a) (5), 8 (d), and 9 (a) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, *et seq.*). The pertinent provisions are set out in the Appendix, *infra*, pp. 20-21.

STATEMENT

Pursuant to a representation proceeding under Section 9 of the Act the Board, on September 2, 1948, certified the Office Employees International Union, AFL, Local No. 27, herein called the Union,

as the exclusive bargaining representative of respondent's office employees in an appropriate bargaining unit (R. 166-167; 40-41). Thereafter, between November 30, 1948, and the time of the hearing before the Trial Examiner on July 26, 1949, the parties engaged in negotiations with respect to a collective agreement (R. 149, 167-171; B. A. 23-24). At the first meeting the Union submitted a proposed contract covering all principal matters except wages, with a view toward reaching tentative agreement on other matters before discussing a wage scale (R. 167; B. A. 25-26, 36-37, P. A. 48-60). No agreements were reached either at this meeting or at the second meeting, held on December 15, at which the Union proposed an increased wage rate schedule (R. 167; B. A. 39-40, P. A. 60-63). Thereafter negotiations were recessed to January 10, 1949, to give respondent time to study the Union's proposals (R. 167; B. A. 40-41).

At the January 10 meeting, respondent proposed that the following "management prerogative clause" be incorporated in the contract (R. 167-168; B. A. 42-43):

> The right to select, hire, to promote, demote, discharge, discipline for cause, to maintain discipline and efficiency of employees, and to determine schedules of work is the sole prerogative of the Company and the Company's decision with respect to such matters shall never be the subject of arbitration.

The Union objected on the ground that if it accepted this clause it would be abdicating the bargaining rights secured it by the Board's certification (R. 168; B. A. 43-44, P. A. 16). From this time on throughout the negotiations, however, respondent took the position that it would enter into no contract which did not contain its prerogative clause.

At two further conferences on January 11 and 12, the Union attempted to bypass the prerogative clause temporarily in order to secure agreement on other proposed provisions (R. 168; B. A. 45-46). This attempt proved unsuccessful because, as the Board found (R. 168; B. A. 46-47), the proposed prerogative clause, which respondent insisted must be incorporated in any contract with the Union, "so pervaded the field of bargaining that all paths of discussion appeared to be blocked by it."[1]

Respondent's attorney and principal negotiator stated that "if the Union will agree to accept that prerogative clause, I can guarantee you a contract within an hour or two" (B. A. 47). The Union replied that such a contract would be worthless since the clause empowered the Company to change rates of pay unilaterally, to arrange work schedules at any time without regard to shift differentials, and to demote and discipline "for cause"

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[1] The only agreements reached related to such undisputed matters as a recognition clause, a no-strike clause, and elimination of physical examination of new employees (R. 168; B. A. 50).

without any definition of that term (*ibid.*). Respondent finally stated that it could not negotiate any further until the Union agreed to the "prerogatives of management," and added that under the Taft-Hartley Act it "did not have to recede from any position," and that therefore the negotiations were "deadlocked." The Union denied that there was a deadlock, and suggested an adjournment so that the conferees could study each other's proposals and evolve some compromise on the prerogative clause problem (R. 168; B. A. 47-49).

The next conference was held on January 18, 1949 (R. 168; B. A. 51). Respondent continued to insist on the prerogative clause, suggesting that if it administered the clause unfairly, the Union would have recourse to the Board, and that consequently it was unnecessary to provide for arbitration of disputed Company decisions taken pursuant to the clause (R. 168; B. A. 51-52). Respondent expressed its willingness to contract that the terms of the Fair Labor Standards Act and other applicable statutes would govern the rights of employees where pertinent, but said that it would not agree to provisions going beyond such requirements (R. 168; B. A. 52). At this meeting respondent submitted a set of counterproposals to the Union (R. 169; B. A. 53-58, P. A. 64-79), which provided, in the main, for continuance of the existing wage scale, and leave policy, and restated in

greater detail the management prerogatives insisted upon by the Company. The new prerogative clause read as follows (R. 168; P. A. 66-67):

> Nothing in this agreement shall be deemed to limit or restrict the company in any way in the exercise of the customary functions of management, including the right to make such rules not inconsistent with the terms of this agreement relating to its operation as it shall deem advisable, and the right to hire, suspend, discharge or otherwise discipline an employee for violation of such rules or for other proper cause.
>
> The right to select and hire, to promote to a better position, to discharge, demote, or discipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration.

The next day, January 19, the prerogative clause again was the principal topic of discussion. The

Union reluctantly agreed to accept the first paragraph of the clause, but continued to assert that the inclusion of the remainder in a contract would make such agreement meaningless and subvert the Union's status as bargaining representative (R. 169-170; B. A. 58-62). Respondent stated that it had a right to insist on the inclusion in a contract of any clause it desired, and that unless the Union agreed to the amended "prerogative clause" there would be no contract (B. A. 59). Respondent added that this clause was the "meat of the contract" and that if the Union accepted it a contract would be signed in "short order" (R. 170; B. A. 60-61).

On January 28, 1949, the Union filed a charge with the Board alleging, *inter alia,* that the Company had refused to bargain in good faith in violation of Section 8 (a) (5) of the Act (B. A. 62). Nevertheless, negotiations were resumed on February 7, 1949, with both parties maintaining their previously expressed positions with respect to the inclusion of respondent's prerogative clause in any contract (R. 170; B. A. 63-65). With respect to other matters, respondent took the position that no law required it to raise wages, grant a better sick-leave plan, or negotiate an arbitration clause (*ibid.*).

The Company and Union continued to meet until the date of the Board hearing on July 26, 1949 (B. A. 24, 104). The conferees remained in disagreement, however, on the issue of the preroga-

tive clause which the Company continued to insist upon as a condition to concluding a contract. At a meeting held on March 11, 1949, the Union requested a copy of the Company's rules and regulations in order to determine more accurately the probable effect of petitioner's prerogative clause (B. A. 94-95, 140). These rules gave the Company complete power "in its discretion" to "establish new rules and practices," and "amend" or "cancel" existing rules and practices (B. A. 141-154). The regulations also reserved to the Company the "exclusive right" to take "whatever action it deems advisable," including discharge, for violations of the rules (B. A. 154). In addition, under its regulations, the Company possessed the sole right to determine whom to "promote or demote," and the "exclusive right to transfer, temporarily or permanently, to any department, employees of other departments regardless of seniority" (B. A. 142-143). The Company also retained the "exclusive right to approve or disapprove requests for leave of absence," and to distribute overtime work to "employees of its own choosing . . . if in the opinion of the Company, such action becomes necessary" (B. A. 144, 149). The Union representatives declared that these rules, when considered in conjunction with the proposed prerogative clause, made any collective bargaining agreement covering any of these points meaningless (B. A. 96).

At a meeting held on May 19, 1949, the Union submitted a complete set of new counterproposals to the Company, accepting respondent's existing wage scale, and vacation and sick leave schedule (R. 170-171; B. A. 83-84). Respondent's prerogative clause was agreed to with a proviso that respondent exercise its prerogative in a "fair and just manner" (R. 170-171; B. A. 97-98, P. A. 108). Respondent rejected the compromise on the ground that by its terms, decisions taken by the Company pursuant to the prerogative clause would still ultimately be subjected to arbitration (R. 171; B. A. 97-98). Respondent repeated its assertion that it would never condition its prerogative on arbitration, and that no law required it to (R. 170-171; B. A. 97-98).

At various times during the negotiations between November 1948 and May 1949, respondent, without consulting or notifying the Union, established new night shifts in several departments of the office. An hourly wage of one dollar was instituted for workers employed on the new shifts, in contrast to the $85 per month starting salary for day shift workers (R. 149; B. A. 119-120, 135-137). When the Union objected to respondent's unilateral action in this regard, respondent stated that its management prerogative permitted the taking of such action without prior consultation with the Union (B. A. 124-125). Similarly, while the negotiations were still in progress, respondent, without

consulting the Union, instituted a new system of staggered lunch hours [2] (R. 149; B. A. 128-131).

After issuance of the Trial Examiner's intermediate report and before the Board's decision, respondent and the Union executed a contract containing, among other things, a prerogative clause not materially different from that insisted upon by respondent throughout the negotiations discussed above (R. 152; 121-143).[3]

The Board found (R. 149) that, by the prerogative clause, respondent "sought to reserve to itself the exclusive right to determine unilaterally such terms and conditions of employment as working rules, work schedules, the establishment of extra shifts, lay-off policy, lunch periods, the granting of leave of absence, and the distribution of overtime." The Board concluded (R. 150) that, since

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[2] Before changing the lunch hour Dribell, respondent's representative, did ask Stafford, the Union's principal negotiator, if he personally had any objection to the proposed change. Stafford replied that he did not personally care, but that the proposal should be first discussed with the official Union negotiating committee. This respondent failed to do (B. A. 128-131).

[3] Respondent moved the Board to dismiss the refusal-to-bargain charges on the ground that this agreement rendered the charges moot (R. 152; 113-121). The Board denied the motion on the ground (R. 152) that, even assuming that respondent had finally abandoned its unlawful conduct, "the discontinuance of unfair labor practices does not render moot charges based thereon." *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 567; *National Labor Relations Board* v. *Pool Manufacturing Co*, 339 U. S. 577, 581-582. The Board found further (R. 152) that effectuation of the policies of the Act required that respondent be directed to cease and desist from engaging in the conduct which the Board found to be violative of the Act.

the subjects covered by the prerogative clause affected "terms and conditions of employment", they were subjects of compulsory bargaining under the Act and, accordingly, respondent's "demand for the prerogative clause as a condition to making a contract . . . [was] in derogation of the Union's bargaining rights secured to it by Section 9 (a) as the exclusive representative of the Respondent's employees and therefore constituted . . . per se [a] violation . . . of Section 8 (a) (5) and (1)" of the Act, quite apart from any question of respondent's good faith. The Board found also (R. 149-150) that respondent's action in establishing new work shifts and changing the employees' lunch period, while negotiations were in progress without consulting or notifying the Union, was in violation of Section 8 (a) (5) and (1) of the Act. In addition, the Board found (R. 150-152) that respondent's whole course of dealing with the Union, including its refusal to enter into any contract unless the Union agreed to the restrictive prerogative clause, constituted an unlawful refusal to bargain in good faith.[4]

To remedy the violation of the Act manifested by respondent's refusal to execute any contract which did not contain the restrictive prerogative clause,

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[4] The Board also found (R. 153, 161-163) that respondent had violated Section 8 (a) (1) of the Act by interrogating employees concerning their union activities and threatening economic retaliation against them for such activities. This finding was sustained by the court below (R. 189-190, 193), and no issue with respect thereto is presented.

the Board's order (Par. 1 (a), R. 153) required respondent to cease and desist from refusing to bargain collectively with the Union "by insisting as a condition of agreement, that the said Union agree to a provision whereby the Respondent reserves to itself the right to take unilateral action with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment."

The court below, while sustaining the Board's finding that respondent's unilateral action with respect to the work shifts and lunch period violated Section 8 (a) (5) of the Act (R. 153, 161-163, 192),[5] held (R. 191-192), that the Board "was wrong in its . . . conclusion that the Respondent, by insisting on the so-called prerogative clause as a condition of agreement, failed to perform its statutory obligation to bargain," and refused to enforce paragraph 1 (a) of the Board's order (R. 153) which required respondent to cease and desist from such conduct.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that under Section 8 (a) (5) of the Act an employer may refuse to enter into any contract with a union unless the union agrees to include therein a clause waiving its statutory right to bargain about certain terms or conditions of employment.

[5] No review of this holding has been sought.

2. In not enforcing paragraph 1 (a) of the Board's order.

REASONS FOR GRANTING THE WRIT

1. The decision below permits employers in effect to refuse to bargain about certain terms and conditions of employment as to which, under Section 8 (a) (5) of the Act, the employer owes an obligation to bargain. There is no question but that work schedules, and other matters covered by the Company's "prerogative" clause, are within the area of compulsory collective bargaining as defined by Section 8(a) (5) and 8 (d). In *Electric Railway & Motor Coach Employees, etc. v. Wisconsin Employment Relations Board,* 340 U. S. 383, 399, this Court, citing the Board's decision in the instant case, held that "problems of work scheduling and shift assignment" are matters on which employers are required by the National Act to bargain collectively. And the court below, in holding that the employer violated Section 8 (a) (5) by unilaterally establishing new work shifts without consulting the Union, apparently recognized that an employer may not, consistently with the National Act, refuse to bargain collectively on this subject.

From the outset of negotiations the Company, insisting that these matters fell within the area of "management prerogative" rather than the area of collective bargaining, repudiated its obligation to bargain collectively with respect to them. The

Company refused to submit the subject of work schedules, among other conditions of employment, to the process of collective bargaining; it refused in advance even to consider negotiating with the Union as to what the work schedules should be.

The Company aggravated its refusal to treat shift schedules, etc., as a bargaining issue by conditioning the execution of any contract upon the Union's acquiescence in the Company's position that there should be no bargaining as to these subjects. This conduct compounded, rather than, as the court below apparently believed, minimized the illegality of the Company's stand. The statutory obligation to bargain with the exclusive representative in good faith and to embody terms and conditions which are agreed upon in a contract (*H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514), is unconditional and may not be evaded by the imposition of private conditions. The "Act guarantees to the employees the right to bargain collectively * * * and it is not for the employer to restrain or interfere with the exercise of that right by insisting upon unwarranted conditions." *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. A. 3).

The condition here exacted by the Company for performance of its statutory duty to bargain collectively was the sacrifice by the Union of its statutory right to bargain about shift schedules. If the decision below stands, employers may unilaterally narrow the area of terms and conditions on which

bargaining is required under the Act by refusing, as the Company did in this case, to execute any contract unless the employer is released from his statutory obligation to bargain on one or more subjects. To sanction this technique is to compel employees to surrender one portion of their statutory rights as the price of enjoying another portion.[6] By this device the bargaining obligation is robbed *pro tanto* of its effectiveness as an instrumentality of industrial peace, and the rights which Congress conferred upon employees are whittled away.

The court below evidently believed that the employer's conduct in the instant case was warranted by the principle, embodied in Section 8 (d), that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."[7] In the Board's

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[6] Cf. *Bethlehem Steel Company*, 89 NLRB 341, enforcement denied on other grounds, June 7, 1951 (C.A. D.C.), where the employer conditioned the making of any contract upon the union's agreement to a provision restricting its absolute right, under the second proviso to Section 9 (a) of the Act, to an opportunity to be present at the adjustment of grievances. See also, the cases cited, *infra*, pp. 17-18, dealing with the problem of employer insistence that a union waive the exercise of various rights unconditionally guaranteed by the Act.

[7] Section 8(d) provides:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

view, the proposals and concessions thus referred to relate only to substantive terms and conditions of employment which are governed not by the terms of the statute but by agreement of the parties. The Act does not compel agreement on any particular wage demand or require the employer to agree to any particular shift schedule. But the freedom to disagree on substantive economic issues does not comprehend freedom to repudiate the obligation, which the statute does impose, to bargain collectively upon request about shift schedules and other conditions of employment, no less than wages. It cannot be that Congress in one breath imposed the duty to bargain upon request and in the next breath provided that denial of the request should eliminate the duty.

The Board's view does not imply, of course, that a labor organization may not lawfully agree for the duration of a contract to waive its right to bargain concerning particular subjects in the area of wages, hours, and working conditions. Nor does it mean that an employer may not lawfully request the union to agree to such a provision, and offer concessions in the form of improved substantive terms in order to obtain the union's consent to such a waiver. It does mean, however, that if the union rejects the employer's offer and continues to request bargaining on these as well as all other subjects, the employer may not refuse to attempt to reach agreement about them. And it also means

that the employer may not offer performance of his statutory obligation to bargain collectively as the "concession" for the union's acquiescence in his proposal.

2. The decision below conflicts, in principle, with decisions of the Courts of Appeals for the First, Fourth, Seventh and Ninth Circuits, which hold that an employer may not exact surrender of rights which the statute unconditionally guarantees employees as the price of bargaining for a contract. In *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* 116 F. 2d 748, certiorari denied, 313 U. S. 565, the Seventh Circuit held that the employer could not properly compel the union to bargain concerning the matter of exclusive recognition, that "the recognition required by [Section] 9 (a) is not a bargaining matter," and that a contrary view "would confer upon the employer the option of bargaining concerning a matter guaranteed the employee as of right . . ." (*Id.,* at p. 751). In *Hartsell Mills Co.* v. *National Labor Relations Board,* 111 F. 2d 291, the Fourth Circuit held that the employer could not properly make the union's surrender of its right to file unfair labor practice charges with the Board, under Section 10 (b) of the Act, "a condition precedent to further negotiations" with respect to a contract (*id.,* at p. 292). In *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. 2d 874, 883, certiorari denied, 313 U. S. 595, the First Cir-

cuit held that the employer could not properly condition the execution of any contract upon the union's agreement to a clause which effected a surrender of its right to bargain in the future for a closed-shop and check-off. And, in *Richfield Oil Corp.* v. *National Labor Relations Board*, 143 F. 2d 860, the Ninth Circuit held that the right of merchant sailors to have the assistance of their union "shore delegates" in settling grievances with the employer was a "necessary incident of the sailors' right of collective bargaining," that in the absence of a waiver "the right exists," and the employer, during contract negotiations, "cannot deny its exercise for the purpose of making a better bargain as to some other provision of the contract" (*id.*, at pp. 861-862).

3. The decision below raises questions of obvious large importance in the administration of the National Labor Relations Act and the effectuation of the rights of collective bargaining secured by the Act. To permit an employer to insist, as an absolute prerequisite to the consummation of an agreement, that the union abandon its statutory right to bargain collectively on fundamental matters affecting wages, hours, and working conditions is to emasculate the holdings that these are not subjects of "management prerogative" but matters on which the employer owes a statutory obligation to bargain.[8] The technique here employed,

[8] E. G. *Electric Railway* case, *supra*, 340 U.S., at p. 399; *National Labor Relations Board* v. *J. H. Allison & Co.*, 165

and sustained by the court below, places in the path of bona fide collective bargaining a roadblock no less impassable than an absolute refusal to bargain at all.

CONCLUSION

The issue presented is of substantial importance in administration of the Act, and the decision below conflicts in principle with the decisions of other Courts of Appeals. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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National Labor Relations Board.

JUNE 1951.

F. 2d 766, 768 (C.A. 6), certiorari denied, 335 U.S. 814; *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 251-253 (C.A. 7), certiorari denied, 336 U.S. 960; *W. W. Cross & Co. v. National Labor Relations Board*, 174 F. 2d 875 (C.A. 1).

APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are as follows:

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bar-

gaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

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